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IN THE
SUPREME COURT OF MISSOURI

SC92380

GARY F. TOELKE, Sheriff, et al.,

Defendants/Appellants.

v.

JOHN DOE,

Plaintiff/Respondent.

Appeal from the Circuit Court of the County of Franklin,
The Honorable Gael D. Wood, Circuit Judge

BRIEF OF APPELLANT COL. RONALD K. REPLOGLE

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JURISDICTIONAL STATEMENT

John Doe filed a "Petition for Declaratory Judgment, Writ of Prohibition, Permanent Injunction, and Destruction of Records" in Franklin County Circuit Court against Gary F. Toelke, Sheriff of Franklin County, and Colonel Ron Replogle, Superintendent of the Missouri State Highway Patrol. Doe sought a declaration that he does not have to register under the Sex Offender Registration Act ("SORA"), §§ 589.400 *et seq.*, RSMo (2011 Cum. Supp.), and that § 589.400.1(7), is unconstitutional.[1/] Doe also requested a declaration that he does not have to register under the federal Sex Offender Registration and Notification Act ("SORNA"), as well as destruction of his registration records.

The circuit court issued a judgment finding that "Section 589.400 RSMo. as applied to Plaintiff Joe [sic] Doe violates Missouri Constitution, Article I, § 13, and is therefore unconstitutional." The court declined to consider Doe's requested declaration that he does not have to register under SORNA, deferring the question to a federal court. The court also denied Doe's request for destruction of records. Because this case involves the validity of a statute of this state, this Court has exclusive appellate jurisdiction under Article V, § 3 of the Missouri Constitution.

[1/] All references to the Revised Statutes of Missouri will be to the 2011 Cumulative Supplement, unless otherwise noted.

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STATEMENT OF FACTS

On December 6, 1983, John Doe ("Doe") pleaded guilty in the Circuit Court of Franklin County, Missouri, to one count of sexual assault in the first degree, a class C felony, in violation of § 566.040. When Doe was charged, § 566.040 provided, in pertinent part as follows:

> A person commits the crime of sexual assault in the first degree if he has sexual intercourse with another person to whom he is not married and who is incapacitated or who is fourteen or fifteen years old.

§ 566.040, RSMo (1979). Doe, who was twenty-two at the time of his sex offense, had sexual intercourse with a fifteen year old. LF at 52; A14. He was sentenced to six months in the Franklin County Jail, but execution of his sentence was suspended and he was placed on probation for five years. LF at 52; A12-13.

After registering as a sex offender for several years, Doe filed suit in 2010 in the Circuit Court of Franklin County. LF at 4. In his petition, Doe sought a judgment declaring that he need not register in Missouri as a sex offender pursuant to Missouri's sex offender registration law ("SORA"), §§ 589.400, *et seq*., that § 589.400.1(7) violates Article I, § 13, of the Missouri Constitution, and that he need not register in Missouri as a sex offender pursuant to the federal Sex Offender Registration and Notification Act, 42

U.S.C. §§ 16901, *et seq.* ("SORNA"). LF at 4. In addition, Doe sought an order requiring that defendants remove his name from the registry and destroy registration records. *Id.*

The case was tried on a stipulated record that included a certified copy of Doe's criminal court file. LF at 69; Ex. A. The circuit court entered a judgment declaring § 589.400 unconstitutional as applied to Doe, but declined to consider whether Doe is required to register under federal law, and therefore denied Doe's request for the destruction of records, noting that Doe may be required to register under federal law. LF at 70.

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POINTS RELIED ON

I. The Circuit Court Erred in Refusing to Determine That Doe Is Required to Register Under the Federal Sex Offender Registration and Notification Act, Because Circuit Courts are Courts of General Jurisdiction, In That Circuit Courts Have an Obligation to Decide Both State and Federal Law.

Carlson v. Central Trust Bank,

838 S.W.2d 483 (Mo. App. S.D. 1992)

State ex rel. Stewart v. McGuire,

838 S.W.2d 516 (Mo. App. S.D. 1992)

Mo. Const. Article V, § 14

II. The Circuit Court Erred in Declaring § 589.400 Unconstitutional, Because the Requirement to Register is Not Retrospective in Its Operation, In That it Requires a Sex Offender to Register in Accordance with Missouri Law – Including Lifetime Registration – if the Sex Offender "Has Been or Is Required to Register . . . In Another State or . . . Under Tribal, Federal, or Military Law."

State ex rel. Koster v. Olive, 282 S.W.3d 843 (Mo. banc 2009)

Doe v. Keathley, 290 S.W.3d 719 (Mo. banc 2009)

§ 589.400.1(7)

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SUMMARY OF THE ARGUMENT

This case raises a vital issue for sex offender registration in Missouri; namely, what requirements apply to a sex offender who committed sex offenses in another state or who is required to register under federal law or another state's law? The General Assembly anticipated this question and provided the answer in the plain language of the statute – Missouri's requirements, including lifetime registration, apply to: "Any person who . . . has been or is required to register in another state or has been or is required to register under tribal, federal, or military law . . . ." § 589.400.1(7). The circuit court missed the mark in attempting to answer this question.

Most states have different registration requirements for sex offenders, including the length of registration, the frequency of reporting, and a variety of other specific requirements. *See, e.g.,* Iowa Code § 692A.106.1 (requiring registration for a period of ten years). Even federal law, which provides an independent basis for registration, has different provisions for registration. These variations would be difficult, if not impossible, for Missouri authorities to enforce. Yet, if the circuit court's interpretation is upheld, two sex offenders who committed virtually identical sex offenses in different states, but who then move to Missouri, could potentially be subject to different registration requirements administered by the same Missouri authorities.

This is not the result contemplated by the plain language of the statute and should be reversed.

The circuit court's first error in this case was its failure to consider whether Doe is required to register under federal law. As courts of general jurisdiction, circuit courts are "obligated to determine questions which fall within their jurisdiction." *Carlson v. Central Trust Bank*, 838 S.W.2d 483, 485 (Mo. App. S.D. 1992). As there is no basis to refuse or defer jurisdiction in this case, the circuit court erred in not determining that Doe is required to register under SORNA.

The circuit court also erred by holding § 589.400 unconstitutional as retrospective in its operation. Missouri law, requiring registration if a sex offender "has been or is required to register in another state or has been or is required to register under tribal, federal, or military law," is not retrospective in its operation. Instead of focusing on past criminal conduct, § 589.400.1(7) is based on an individual's current status as a registered sex offender. And so it is with Doe, who does not dispute that he has been required to register in Missouri for several years. Indeed, even if his duty to register runs out under another state's law or federal law, he is still required to register in accordance with Missouri law. Therefore, the circuit court should be reversed.

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ARGUMENT

Standard of Review

The jurisdiction of a court to determine an issue "is purely a question of law, which is reviewed *de novo*." *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n,* 102 S.W.3d 10, 22 (Mo. banc 2003); *see also J.C.W. ex rel. Webb v. Wyciskalla,* 275 S.W.3d 249 (Mo. banc 2009) (concluding that there are only two kinds of jurisdiction: subject matter jurisdiction and personal jurisdiction).

The interpretation and application of a statute to a given set of facts is a question of law that this Court reviews *de novo*. *Ochoa v. Ochoa,* 71 S.W.3d 593, 595 (Mo. banc 2002). "A statute is presumed to be constitutional and will not be invalidated unless it 'clearly and undoubtedly' violates some constitutional provision and 'palpably affronts fundamental law embodied in the constitution.' " *Board of Educ. of City of St. Louis v. State,* 47 S.W.3d 366, 368-69 (Mo. banc 2001) (internal citations omitted). The party challenging the validity of a statute, such as Doe, has the burden of proving the statute unconstitutional. *State v. Salter,* 250 S.W.3d 705, 709 (Mo. banc 2008).

Here, the circuit court impermissibly refused to determine an issue of federal law, and Doe failed in his burden to establish that § 589.400.1(7) is unconstitutional. Therefore, the circuit court should be reversed and Doe must register as a sex offender in accordance with Missouri law.

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I. The Circuit Court Erred in Refusing to Determine That Doe Is Required to Register Under the Federal Sex Offender Registration and Notification Act, Because Circuit Courts are Courts of General Jurisdiction, In That Circuit Courts Have an Obligation to Decide Both State and Federal Law.

Before addressing the circuit court's constitutional error, we must begin with a preliminary error – the court's refusal to determine if Doe is required to register under SORNA. Without explanation or citation, the court simply "decline[d] to consider the question of federal law [and] defer[ed] to a federal court determination of these issues." Appellant's Appendix ("App.") App. A1. Not only was this an error of law, but resolution of this federal issue further confirms Doe's duty to register in accordance with Missouri law.

A. The Circuit Court Had an Obligation to Decide Both State and Federal Law.

Article V, § 14 of the Missouri Constitution " 'sets forth the subject matter jurisdiction of Missouri's circuit courts in plenary terms, providing that the circuit court shall have original jurisdiction over all cases and matters, civil and criminal.' " *State v. Molsbee,* 316 S.W.3d 549, 552 (Mo. App. W.D. 2010) (quoting *Webb,* 275 S.W.3d at 253) (quotation marks omitted). As such, circuit courts in Missouri are courts of general

jurisdiction, deciding both state and federal claims and issues. Indeed, as courts of general jurisdiction, there is a "presumption" that circuit courts have jurisdiction as long as the record does not "affirmatively make it appear" that there is no jurisdiction. *Gill v. Sovereign Camp, W.O.W.*, 236 S.W. 1073, 1075 (Mo. App. S.D. 1922); *see also Davidson v. Schmidt*, 164 S.W. 577 (Mo. Div. 1 1914) ("The circuit court is a superior court of general jurisdiction, and nothing will be presumed to be without its jurisdiction.").

It is reversible error for a court to refuse to determine questions which fall within their jurisdiction. *See Carlson,* 838 S.W.2d at 485 (citing 21 C.J.S. Courts § 68, p. 85 (1990)). Indeed, a writ of mandamus is appropriate where a court "refuses to act in respect to a matter within its jurisdiction when it is its duty to act, that is, when its refusal is, in effect, a failure to perform a duty within its jurisdiction." *State ex rel. Stewart v. McGuire,* 838 S.W.2d at 518 (Mo. App. S.D. 1992) *quoted in State ex rel. Tanner v. Nixon*, 310 S.W.3d 727, 729 (Mo. App. W.D. 2010).

Moreover, there are no applicable rules of abstention permitting the circuit court in this case to decline or defer jurisdiction to a federal court because generally courts are "obligated to determine questions which fall within their jurisdiction." *Carlson,* 838 S.W.2d at 485 (citing 21 C.J.S. Courts § 68, p. 85 (1990)). As there is no basis to refuse or defer jurisdiction in this

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case, the circuit court erred in not determining whether Doe is required to register under SORNA.

B. Doe is Required to Register as a Sex Offender Under SORNA.

In 2006, Congress enacted SORNA, which provides, in pertinent part that a "sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). The Act further states that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter." 42 U.S.C. § 16913(d).

Pursuant to this authority, the Attorney General issued a rule, effective February 28, 2007, which states that the "requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3. Thus, regardless of when he was convicted, federal law requires Doe to register if he is a "sex offender" within the meaning of 42 U.S.C. § 16913(a); *Keathley,* 290 S.W.3d at 720.

The reason this requirement was made retroactive to all sex offenders is made clear by the Supreme Court: "Sex offenders are a serious threat in this Nation. 'The victims of sex assault are most often juveniles,' and 'when

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convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.' " *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 4 (2003) (internal citations and quotations omitted).

The application of SORNA to sex offenders whose convictions predate SORNA creates no ex post facto problem because the SORNA sex offender registration and notification requirements are intended to be nonpunitive, regulatory measures adopted for public safety purposes, and hence may validly be applied (and enforced by criminal sanctions) against sex offenders whose predicate convictions occurred prior to the creation of these requirements. *Smith v. Doe*, 538 U.S. 84, 102-03 (2003).

Under SORNA, a "sex offender" is "an individual who was convicted of a sex offense." 42 U.S.C. § 16911(1). The definition of "sex offense" includes "a criminal offense that has an element involving a sexual act or sexual contact with another." 42 U.S.C. § 16911(5)(A)(i). "[A] criminal offense that is a specified offense against a minor" is also a "sex offense." 42 U.S.C. § 16911(5)(A)(ii). The phrase "specified offense against a minor" includes "[c]riminal sexual conduct involving a minor" and "[a]ny conduct that by its nature is a sex offense against a minor[.]" 42 U.S.C. § 16911(7)(H) and (I). A "minor" is "an individual who has not attained the age of 18 years." 42 U.S.C. § 16911(14).

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Doe unquestionably pleaded guilty to violating § 566.040, by subjecting a minor victim to sexual intercourse. *See Thurman v. State,* 263 S.W.3d 744, 752 (Mo. App. E.D. 2008) ("A guilty plea is an admission to the facts in the indictment or information."); *Milligan v. State,* 772 S.W.2d 736, 739 (Mo. App. W.D. 1989) (same). Because Doe subjected his minor victim to sexual intercourse, there can be no dispute that he is a sex offender that has been or is required to register under SORNA.[2/] And in fact, he did register as a sex offender for several years.

[2/] Although the circuit court refused to decide whether Doe is required to register as a sex offender under SORNA, the court conceded that for Doe "registration may be required under federal law." App. A1. The court's equivocation appears to be based on an issue as to whether Doe has satisfied the requirement under SORNA that he "keep the registration current for the full registration period" – twenty-five years. 42 U.S.C. § 16915(a). There is no evidence that Doe has kept his registration current for twenty-five years. Furthermore, this issue is not dispositive in this case because Doe is still required to register in accordance with Missouri law.

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II. The Circuit Court Erred in Declaring § 589.400 Unconstitutional, Because the Requirement to Register is Not Retrospective in Its Operation, In That it Requires a Sex Offender to Register in Accordance with Missouri Law – Including Lifetime Registration – if the Sex Offender "Has Been or Is Required to Register . . . In Another State or . . . Under Tribal, Federal, or Military Law."

The circuit court erroneously held that § 589.400 violates the Missouri Constitution, Article I, § 13, and is therefore unconstitutional as applied to Doe. The court reasoned that § 589.400 imposes a lifetime registration duty, whereas SORNA requires Doe to register for only twenty-five years. On this basis, the court found that Missouri law retrospectively imposes a previously non-existing duty. The trial court's conclusions, however, misapprehend the interplay between SORA and SORNA, as well as the law concerning retrospective operation.

A. SORA – a Remedial Statute Subject to Liberal Construction – Requires That Doe Register in Accordance with Missouri Law.

Section 589.400 provides that a sex offender in Missouri is subject to all registration requirements under SORA – including lifetime registration – if

the sex offender "has been or is required to register in another state or has been or is required to register under tribal, federal, or military law." § 589.400.1(7). In analyzing the application of this statute to the facts, the primary rule of statutory construction is to "ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." *State ex rel. Koster v. Olive,* 282 S.W.3d at 848-49 (citing *St. Louis Police Officers' Ass'n v. Bd. of Police Comm'rs of the City of St. Louis,* 259 S.W.3d 526, 528 (Mo. banc 2008)).

"The obvious legislative intent for enacting sec. 589.400 was to protect children from violence at the hands of sex offenders" and to respond to the known danger of recidivism among sex offenders. *J.S. v. Beaird,* 28 S.W.3d 875, 876 (Mo. banc 2000); *see also Doe v. Phillips,* 194 S.W.3d at 839-40 ("The purpose of Missouri's Megan's Law, and of similar acts in other states, is to 'protect children from violence at the hands of sex offenders,' and to respond to the known danger of recidivism among sex offenders.") (internal citations and quotations omitted).

Statutes enacted for the protection of life and property, or which introduce some new regulation conducive to the public good, are considered remedial in nature and are generally given a liberal construction. *See City of St. Louis v. Carpenter*, 341 S.W.2d 786 (Mo. Div. 2 1961) (citing 82 C.J.S.

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Statutes § 388, p. 918; 50 Am. Jur., Statutes § 395, p. 420; *Barbieri v. Morris, Mo.,* 315 S.W.2d 711, 714 (Mo. Div. 2 1958); *State ex rel. Whatley v. Mueller,* 288 S.W.2d 405, 409 (Mo. App. 1956)). Because it was enacted for purposes of public safety, SORA is a remedial statute. Remedial statutes are to be liberally construed, "so as 'to meet the cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, provided such interpretation is not inconsistent with the language used ... resolving all reasonable doubts in favor of applicability of the statute to the particular case.' " *State ex rel. LeFevre v. Stubbs,* 642 S.W.2d 103, 106 (Mo. banc 1982).

The plain language of § 589.400.1 applies to anyone who "has been or is required to register." The language contemplates that a sex offender's obligation to register under another state's law or federal law may expire; thus, the use of "has been." Therefore, if a sex offender who is required to register, or who has been required to register then moves to Missouri they become subject to the requirements of SORA. Missouri's registration requirements are not based on a past act or conviction, but on the person's status as a sex offender.

There is no dispute that Doe meets the definition of a sex offender under SORNA. Furthermore, Doe is required to register, or has been required to register as a sex offender under federal law. Section 589.400.1,

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subdivision (7) applies to any person such as Doe who "has been or is required to register in another state or has been or is required to register under tribal, federal, or military law." § 589.400.1(7). It is Doe's current status as a sex offender, coupled with the independent obligation to register under SORNA, which triggers application of Missouri law. Pursuant to Missouri law, even if Doe's independent obligation to register under federal law runs out, because he is a person who is or *has been* required to register under federal law, he is subject to Missouri's registration requirements. *See Keathley*, 290 S.W.3d at 720.

An essential reason why all sex offenders in Missouri are required to register in accordance with SORA becomes quickly evident. Take, for example, an offender who is convicted in Missouri and is required to register as a sex offender for life. Now suppose a different offender is convicted of identical acts in another state which requires only registration for one year. After six months, the second offender moves to Missouri and claims he only has to register for six more months. To find that the out-of-state offender is not subject to Missouri's registration requirements would result in two people with the status of sex offender, convicted of the same criminal conduct, but one must register for life and the other has to register for one year.

Sex offenders with minimal registration requirements would relocate to Missouri without fear of consequences for refusing to register. Such an

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interpretation and application is not consistent with the statute or the legislature's intent. And regardless of the sex offender's state of residence at the time of conviction, an offender who resides in Missouri and who has committed an offense which, if committed in this state, would be a violation of chapter 566, is subject to Missouri law and must register in accordance with Missouri's SORA requirements. *See, e.g., State v. Boeji,* 352 S.W.3d 625, 627 (Mo. App. S.D. 2011) (Sex offender who moved from Illinois to Missouri became subject to SORA upon taking up residence in Missouri).

To find that Missouri law does not apply to a sex offender who moves to Missouri from another state would result in Missouri treating sex offenders as subject to their original jurisdiction's laws. Missouri law enforcement agencies would then be required to administer other state's laws and reporting requirements. Such laws may be more stringent, for example, requiring more frequent in person registration updates or required additional identifiers such as fingerprints. Or they could be less stringent. Either way, the challenges of administration would be daunting.

The disjunctive language in § 589.400.1(7) does not support the conclusion that a person is subject to the laws of their state of origin or the state in which they committed their sex offense. Rather, SORA provides that upon taking up residence in Missouri, if the resident meets the conditions of a sex offender, either because he or she is or has been required to register in

another state or has a conviction that may not require registration in another state but would require registration if committed in Missouri, the offender becomes subject to Missouri law and its registration requirements.

In Missouri, sex offenders must fully comply with all aspects of SORA because their obligations are based on whether they have been or are required to register under federal law. Based on the plain reading of SORA, the offender need not be currently registering under federal law. The fact that they have been required to register falls within the confines of § 589.400.1(7).[3/] In this case, Doe has been registering in Missouri and has unquestionably been required to register under SORNA.

[3/] Section 589.400.3 provides exclusions from lifetime registration as follows:

> The registration requirements of sections 589.400 through 589.425 are lifetime registration requirements unless:
>
> (1) All offenses requiring registration are reversed, vacated or set aside; (2) The registrant is pardoned of the offenses requiring registration; (3) The registrant is no longer required to register and his or her name shall be removed from the registry under the provisions of subsection 6 of this section; or (4) The registrant may petition the court for removal or exemption from the registry under subsection 7

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B. Section 589.400.1(7) Is Not Retrospective in Its Operations, and Therefore Does Not Violate Article I, § 13.

A law is retrospective in its operation if it takes away or impairs a vested or substantial right. *See Beatty v. State Tax Comm'n*, 912 S.W.2d 492, 496 (Mo. banc 1995). A vested right "must be something more than a mere expectation based upon an anticipated consequence of the existing law." *Id.* "Neither persons nor entities have a vested right in a general rule of law or legislative policy that would entitle either to insist that a law remain unchanged." *Id.*

This Court addressed a different retrospective challenge to a Missouri statute in *Olive*. In *Olive,* this Court addressed the constitutionality of a Missouri statute which required dam owners to obtain a permit for a dam on their property. Owners of the property on which the dam was located challenged the act, noting that they owned the property with the dam prior to the statute's enactment and therefore the permit requirement imposed a new duty. This Court found that the permitting requirements do not operate retrospectively because past construction of the dam was not at issue.

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or 8 of this section and the court orders the removal or exemption of such person from the registry.

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Rather, the permitting requirement applied based on the current existence of the dam, and their status as dam owners. *Id.* at 848.

Similarly, Doe's obligation to register under Missouri law is not based on his past criminal acts, but on his current status as a registered sex offender. In *Phillips,* which was decided before SORNA's enactment, this Court found a very narrow exception to the registration requirement for those whose duty to register was based solely on pleas or convictions for conduct committed prior to enactment of Megan's Law on January 1, 1995. However, this Court went on to state in pertinent part:

> This invalidation is very limited in nature. SVPs are still fully required to register and comply with all aspects of Megan's Law because their obligations are based on findings that they are SVPs and not merely on pre-Megan's Law criminal conduct. Once a person is determined to be an SVP, the obligation to register is not based on past criminal conduct, but based on that person's status as an SVP.

Phillips, 194 S.W.3d at 838 (emphasis added). Similarly, Doe's current status as a registered sex offender is the basis for his obligation to register in accordance with Missouri law, not his past criminal act.

In *Keathley*, this Court also held that Missouri's constitutional prohibition against retrospective laws cannot provide relief to offenders who are "subject to the independent, federally mandated registration requirements under the Sexual Offenders Registration and Notification Act (SORNA)." *Keathley*, 290 S.W.3d at 720. Other courts have followed the decision set forth in *Keathley*. *See, e.g., Doe v. Lee*, 296 S.W.3d 498, 500 (Mo. App. E.D. 2009); *Doe v. Worsham,* 290 S.W.3d 809, 812 (Mo. App. S.D. 2009).

Doe has been registering as a sex offender in Missouri, and there is no dispute that Doe has been required to register as a sex offender. Thus, under § 589.400.1(7), Doe is required to register in accordance with Missouri law – including lifetime registration. This requirement is not retrospective in its operation as it is based on the sex offender's status as a registered sex offender and not on the original offense or crime.

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CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court and hold that Doe has been or is required to register under federal law and therefore is required to register in accordance with Missouri law.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on the 13th day of July, 2012, the foregoing brief was filed electronically via Missouri CaseNet and served to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,264 words.

/s/ *Jeremiah J. Morgan*
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